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In The Supreme Court of the United States

October Term, 1984

CENTURY AIR FREIGHT, INC.,

Petitioner,

-vs.-

AMERICAN AIRLINES, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

STATEMENT

This is the reply brief of petitioner ("Century") to the opposition brief of respondent ("American"). It is largely evoked by the enactment on October 4, 1984 of the Civil Aeronautics Board Sunset Act of 1984, Public Law 98-443, 98 Stat.---, an Act "to amend the Federal Aviation Act of 1958, to terminate certain functions of the Civil Aeronautics Board, to transfer certain functions of the Board to the Secretary of Transportation, and for other purposes." American asserts that because of the enactment, effective January 1, 1985, there no longer remains "any issue of public importance worthy of this Court's consideration." (Respondent's Brief, p. 12).

We disagree and subscribe to the doctrine that *stare decisis,* binding courts and judges to follow established law regardless of any deviant views or values which they may favor, is an important enough public value to attract this Court's attention and, if need be, its protection. Indeed, we feel that at this juncture in the case, with sweeping statutory change at hand, the public importance of this Court's hearing the case is, if anything, enhanced. For however well the district court may have anticipated a statutory change coming a year later, its ac-

complishment, as affirmed, was to overturn a thirty year old regime where statutory beneficiaries, passengers and shippers, had an implied right in private suit to money reparation for past acts of carrier misconduct violative of their statutory common carriage rights, a vast area of statutory enforcement otherwise out of jurisdictional reach of an agency powerless to award money reparation. We feel that the error of the courts below is palpable, but should this Court decline review, there is great danger, if we are right, that error will become the last authoritative word on the workings of the Aviation Act of 1958. In that case, since past is prologue to the present and is the stuff from which the law grows and develops, a counterfeit will have been substituted for what should have been the true past.

ARGUMENT

American's concentration on its version of the facts cannot obscure a case whose operative facts are beyond dispute and whose clean-cut law issues present fundamental policy questions under the law to which they relate.

Undisputed is the fact of American's six year sustained refusal to transport as much as a single container of Century's consolidations on its overnight freighter from New York City to San Juan, while according no less than two-thirds of the available space to Century's competitor Profit By Air, Inc. ("PBA"), and its finally breaking its embargo with an award to Century of a one-container, or equivalent, daily allocation in September 1977 four months *after* Century had filed its district court complaint charging violation by American of both Sherman Act §§1 and 2 and Aviation Act § 404, 49 U.S.C. § 1374, and seeking treble damages plus a Clayton Act injunction to force American to furnish transportation.

Add to this that, on American's motion, Century consenting, the Civil Aeronautics Board ("CAB") was invited to take primary jurisdiction of the case, which it did on October 21, 1977 in a letter to the Court:

> "***the undersigned Enforcement Attorney has been in contact with counsel for both parties in the past week. ***I have apprised them of the Board's view of the applicable law and that the public interest warrants that the

Board conduct an investigation of its own through the Bureau of Enforcement ***. I have advised both counsel that, with their permission, I would suggest to the presiding District Judge that he stay the present proceeding pending the outcome of this investigation. This would avoid duplication of effort and the possibility of the court and the Board reaching conflicting results. At the same time, a stay, as opposed to a dismissal, would prevent Plaintiff's monetary claim from being unfairly extinguished by the statute of limitations.

"I have also advised both counsel that at the conclusion of the Board's investigation, this matter, which will now be treated as a formal complaint, will either be dismissed or made the subject of an enforcement proceeding, depending upon the results of that investigation. Both counsel understood the risk and the benefit that each of these results presents to their clients. They have also been informed and recognize that should circumstances warrant it, the Board is empowered to enforce the Act and the antitrust laws***"

(Joint Appendix to Court of Appeals, Vol I, p. 76a)

And the Bureau's conclusion, after investigation, that American had indeed violated both the Sherman Act and the Aviation Act (Petition, Appendix 5) and the Enforcement Proceeding for violation of Aviation Act §404 (b), commenced December 14, 1979, and settled on the basis of a civil fine and a new allocation system effectively guaranteeing Century some space aboard the flight; all serve to make it palpable that American had, from 1971 to September 1977, grossly violated its Aviation Act §404 (a) duty to furnish air transportation aboard the flight on Century's endless requests and thereby violated the §404 (b) prohibition against "unjust", e.g., illegal, discrimination and undue preferencing.

Thus, rather than staking any exoneration of American on a theory of compliance with the requirements of §404 of the Act, the district court opinion, contrary to all authority, held, emphatically, that:

"***Congress intended no private right of action for a violation of §404.***"

"***Indeed there is nothing in the legislative history of either §404 (a) or §404 (b) indicating Congressional intent to give *any* private party a right of action.***"

In its statement of questions presented American seeks to distort the holding below to make it appear that only air freight forwarders—themselves air carriers within the meaning of the Act—are singled out for exclusion from the rights of others, passengers and non-forwarder shippers, to sue under the section for past, executed acts of discrimination in air transportation. How grossly discriminatory this would be is demonstrated by the fact that *all* of the shippers of containerized freight aboard American's flight throughout its history were air freight forwarders.

If the probable commission of error were an ingredient required by this Court, it is abundantly clear that that the overruling in January 1984 of a thirty year policy allowing private suit to fill in a yawning gap in the enforceability of §404 of the Aviation Act coupled with a summary judgment dismissal of Century's antitrust cause before the filing of an answer, itself an unjustified judicial *tour de force*, both done in utter disregard of the results of an administrative investigation conducted pursuant to a primary jurisdiction referral of the case, plainly such an ingredient would be satisfied. In the competition of causes clamoring for review, we believe the public importance of the issues presented here merit the serious consideration of the Court. And to this we believe the enactment of the Civil Aeronautics Board Sunset Act of 1984, P.L. 98-443, on October 4, 1984, adds another dimension.

The Civil Aeronautics Board Sunset Act of 1984

Section 2 of the new Act characterizes the legislation as an amendment of the Civil Aviation Act of 1958, 49 U.S.C. §1301 *et seq.* It is effective January 1, 1985 and transfers the functions of the CAB to the Department of Transportation and its Secretary. It makes many subtantive changes by way of repeal, amendment and additions. Other provisions continue without amendment.

Section 404 of the 1958 Act continues in full force and effect with respect to overseas and foreign air carriage of goods through the balance of this year. Thereafter, it is replaced by the following provision of the new Act:

> "Sec. 3(4) The following provisions of this Act (to the extent such provisions relate to interstate and overseas air transportation) and the authority of the Board with respect to such provisions (to the same extent) shall cease to be in effect on January 1, 1985:
>
> ****
>
> (C) Section 404 of this Act (except insofar as such section requires air carriers to provide safe and adequate service)."

The new statute will, of course, have to fend for itself. But what we do suggest is that, in the judicial and administrative interpretation of "adequate service", it will be helpful—we feel essential—to have an authoritative and correct interpretation of the meaning and application of the old §404.

Section 3(5)(D) of Sunset eliminates many of the §1002 subsections, 49 U.S.C. §1482, of the 1958 Act as amended. However, very significantly we feel, §1002 (k)—the common carrier provision—survives; thus Sec.3(5)(D):

> "Sec.3(5) The following provisions of this Act and the authority of the Board with respect to such provisions shall cease to be in effect on January 1, 1985:****
>
> (D) Sections 1002(d), (e), (g), (h), and (i) of this Act (except insofar as any of such sections relate to foreign air transportation).

Since Respondent's Brief says of §1002 (k) at page 12, footnote 9:

> "Section 1002(k) of the Aviation Act, 49 U.S.C. §1482(k), which figures so prominently in Century's petition, is nothing more than a definitional section. It does not confer or create any rights or duties."

We differ as to the importance of a statutory formula, repeated twelve times, defining air carriage of property as by "common carrier":

"***the term 'interstate air transportation of property' means—

(A) the carriage by aircraft of property as a common carrier for compensation or hire in commerce***

To us, the phrase "common carrier" tells it all, *vide* Peckham, J. in *United States v. Trans-Missouri Freight Association*, 166 U.S. 290, 320, 321 (1897):

"***It is said that this meaning is plainly to be inferred, because of fundamental differences both in an economic way and before the law between trade and manufacture on the one hand, and railroad transportation on the other. Among these differences are the public character of the railroad business, and as a result the peculiar power of control and regulation possessed by the State over railroad companies. The trader or manufacturer, on the other hand, carries on an entirely private business and can sell to whom he pleases*** he may make such discrimination in his business as he chooses, and he may cease to do any business whenever his choice lies in that direction; while, on the contrary, a railroad company must transport all persons and property that come to it, and it must do so at the same price for the same service, and the price must be reasonable, and it cannot at its will discontinue its business."

Gratifying is Section 7 of the new Act which preserves old section 411, 49 U.S.C. §1381, as subsection (a) of the new section 411 and adds a new subsection (b) so that they read as follows:

"Sec. 411(a) Investigations

The Board may, upon its own initiative or upon complaint by any air carrier, foreign air carrier, or ticket agent, if it considers that such action by it would be in the interest of the public, investigate and determine whether any air carrier, foreign air carrier, or ticket agent has been or is engaged in unfair or deceptive practices or unfair methods of competition in air transportation or the sale thereof. If the Board shall find, after notice and hearing, that such air carrier, foreign air carrier, or ticket agent is engaged in

such unfair or deceptive practices or unfair methods of competition, it shall order such air carrier, foreign air carrier, or ticket agent to cease and desist from such practices or methods of competition.

(b) Incorporation by Reference

Any air carrier may incorporate by reference in any ticket or other written instrument any of the terms of the contract of carriage in interstate and overseas air transportation, to the extent such incorporation by reference is in accordance with regulations issued by the Board."

Gone then, is the notion that the air freight forwarder, an "air carrier" in his own right, suffers a disability, unlike non-forwarder shippers and passengers, from enjoying the common carrier benefits, whether expressed in old §404 of the Act or §1002(k), of untrammeled access to air transportation. Section 411, in fact, parallels in its coverage the actual experience of Century from primary jurisdiction referral, the acceptance of its complaint, the determination of public interest, and the initiation of the CAB's formal proceeding on its own administrative complaint, and section 1002(k) of the Act, then and now, could have been the gravamen of the unfair practices and methods of competition substantively found. And subsection (b), marking a departure, actually provides for a personal contract of carriage incorporating the Board regulations which could conceivably incorporate §1002(k).

CONCLUSION

For the foregoing reasons, as well as those expressed in our petition, petitioner earnestly prays for the grant of a writ of certiorari herein.

Respectfully submitted,

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